been no such appropriation, and counsel sought to distinguish that case from the matter before me on the basis that in this case there had in fact been an appropriation before the High Court Order of December 17, 1970, was made by virtue of the matters alleged by the respondent in paragraph 3(j)(iv) of his defence in the Ipoh High Court Civil Suit No. 744 of 1969 which I have already adverted to, and that in the light of this it was open to the appellant to plead a set-off. The short answer to this is, in my view, the fact that by virtue of the discontinuance of the High Court Civil Suit by the appellant the subject matter of that suit and all matters pleaded in the pleadings therein were never adjudicated or determined and no effective appropriation had accordingly ever been made as all matters in issue in the pleadings therein remained as a result at large, and furthermore the very wide terms of the Order of December 17, 1970, would also preclude any consideration of any set-off or such purported appropriation.

In the circumstances I dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Sandu & Co.; L.H. Singh & Co.*

CHOP ENG THYE CO. v. MALAYSIA NATIONAL INSURANCE SDN. BHD.

[O.C.J. (Ajaib Singh J.) September 9, 1976]
[Muar — Civil Suit No. 48 of 1972]

Insurance — Fire Insurance — Claim on a cover note for sum insured against loss by fire — Condition of cover note — Non-compliance with — Whether payment could be recovered.

In March 1971, the plaintiffs applied to the defendants for a fire insurance cover in the sum of $20,000 for their smoke house and its contents for a period of one year commencing April 2, 1971. Pursuant to this application and in consideration of the payment of a premium amounting to $1,000.50 the defendants issued a protection note in favour of the plaintiffs. On April 6, 1971, the smoke house and all the goods therein were destroyed by fire. On April 10, 1971, the plaintiffs gave notice of the fire and loss to the defendants but the latter had failed to settle the sum of $20,000 or any portion thereof under the protection note. Instead, the defendants relied on, *inter alia*, a condition of the said note which stipulated that the defendants should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration.

Held, dismissing the plaintiffs' claim: there was no pending action or arbitration within twelve months of the happening of the loss or damage so that when the plaintiffs filed their action against the defendants, the defendants had ceased to be liable to the plaintiffs for any loss or damage.

Cases referred to:-

(1) *Ramrati Kuer* v. *Dwarika Prasad Singh & Ors.* A.I.R 1967 S.C. 1134.

(2) *Queen Insurance Company* v. *William Parsons* (1881-82) 7 App Cas. 96.

(3) *General Accident, Fire and Life, Assurance Corporation Ltd.* v. *Shuttleworth & Anor.* (1938) 60 Ll. L.R. 301.

CIVIL SUIT.

N. Jagatheeson for the plaintiffs.

Y.M. Raja Abdul Aziz Addruse for the defendants.

Ajaib Singh J.: The plaintiffs claimed a sum of $20,000 from the defendants on a cover note issued by the defendants for that sum against loss or damage by fire to the plaintiffs' smoke house and its contents. The action was commenced by a writ of summons dated May 16, 1972. In their statement of claim the plaintiffs averred that some time in March 1971 they applied to the defendants for a fire insurance cover in the sum of $20,000 for their smoke house and its contents for a period of one year commencing April 2, 1971. Pursuant to this application and in consideration of the payment of a premium amounting to $1,000.50 the defendants issued a protection note in favour of the plaintiffs. The plaintiffs further averred that on April 6, 1971 the smoke house and all the goods therein were destroyed by fire. Due notice of the fire and loss arising therefrom was given to the defendants on April 10, 1971 but the defendants had failed to settle the sum of $20,000 or any portion thereof under the said protection note.

The defendants denied the making or issuing of the protection note and averred that the note was issued without their authority or consent by some person not being a person duly appointed as their agent. They further averred that as soon as they became aware of the protection note they rejected the risk and informed the plaintiffs accordingly on April 15, 1971. The defendants also returned the cheque for $1,000.50 which was deposited by the plaintiffs with the person who issued the protection note. Alternatively the defendants averred that if the issue of the protection note was valid the plaintiffs had failed to observe a condition of the note which stipulated that on the happening of any loss or damage by fire to the property insured the plaintiffs should forthwith give notice thereof to the defendants and should within 15 days after the loss or damage deliver to the defendants a claim in writing for the loss and damage giving particulars of the articles or items damaged or destroyed in the fire and particulars of all other insurances if any covering the same property. In the further alternative the defendants averred that another condition of the note stipulated that the defendants should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration. The plaintiffs having made no reference to arbitration in respect of their claim within the aforesaid period of twelve months and having commenced their action after the expiration of that period the defendants were not liable. Lastly the defendants denied that the plaintiffs had suffered any loss or damage and put the plaintiffs to strict proof thereof.

In their reply to the defence the plaintiffs pleaded estoppel and averred that if the protection note was issued without the authority or consent of the defendants by a person not being their agent the defendants were estopped from denying that the person had authority or consent to issue the protection note. Particulars of estoppel were set out in the reply which stated that by giving the protection note and the proposal form of the defendants to the person who had issued the protection note the defendants thereby represented to the plaintiffs that the person had the authority to fill up and issue the protection note.

Relying on this representation the plaintiffs completed the proposal form, accepted the protection note and issued a cheque for the premium. As to the conditions mentioned in the defence the plaintiffs averred that two letters dated April 15, 1971 and May 28, 1971 written by the defendants to the plaintiffs indicated that they had repudiated and/or evinced an intention not to perform the contract of insurance and therefore the defendants were not entitled to rely upon the conditions. Further the defendants had by their conduct waived their right to arbitration. Lastly it was averred that at all material times the plaintiffs had no knowledge of the conditions referred to in the defence and they averred that the conditions did not form part of the contract of insurance between them and the defendants.

Two witnesses gave evidence for the plaintiffs. The first was Khoo Swee Chong the managing partner of the plaintiffs' firm of Chop Eng Thye Company who stated that some time in March 1971 one Lee Chiang Qui an insurance agent of the defendants came to see him and enquired if he would buy a fire insurance policy for the plaintiffs' smoke house. He said that the insurance agent encouraged him to do so and he finally agreed to take out a policy. The agent then brought some forms and helped to fill them up and he issued a cheque for $1,000.50 as premium. On April 6, 1971 a fire broke out in the smoke house which burnt the smoke house and the contents therein. He then made a police report on the same day and on April 8, 1971 he wrote to Lee Chiang Qui informing him of the occurrence of the fire and requesting him to convey the news to the defendants. It was also stated in the letter that the plaintiffs had not received the insurance policy and asked that it be sent over immediately. On April 10, 1971 the plaintiffs addressed a fire claim form to the defendants setting out particulars of the loss or damage sustained by them as a result of the fire. They also gave the names of two other insurance companies with whom the plaintiffs had insured the same property for a total sum of $10,000. Again on April 12, 1971 the plaintiffs wrote to the defendants requesting the defendants to pay up the insured sum stated in the defendants' cover note of April 2, 1971. In this letter it was also mentioned that on April 10, 1971 one Stephen Lim had called on the plaintiffs introducing himself as the defendants' Inspector sent to examine the extent of the damage to the smoke house. Subsequently the plaintiffs received a letter dated April 15, 1971 from Senibert Sendirian Berhad who were the chief agents of the defendants informing the plaintiffs that their proposal for insurance had been rejected by the defendants. The cheque for $1,000.50 was returned to the plaintiffs together with this letter. The plaintiffs replied to Senibert Sendirian Berhad by letter dated April 29, 1971 with a copy to the defendants for a reconsideration of the matter but on May 28, 1971 Senibert Sendirian Berhad informed the plaintiffs that the rejection of their claim was final. Khoo Swee Chong further said in his evidence that the smoke house and the rubber sheets stored in it were completely destroyed. He said that the approximate value of the smoke house was $10,000 and the rubber sheets were worth about $25,000.

In cross-examination Khoo Swee Chong said that he had insured the smoke house for $5,000 and that was the sum he had mentioned as its value in the proposal form but in the claim form dated April 10, 1971 he had put its value at $10,000. He said further that he had also mentioned in the claim form that he had insured the same property with two other insurance companies namely the Asia Insurance Company and the People's Insurance Company. The policy from the Asia Insurance Company was taken out yearly and it was subsisting at the material time. The other company with whom he had insured was the People's Insurance Company. This was also earlier than the one taken out from the defendants and the cover was also for the smoke house and the rubber. He said that the cover from the Asia Insurance Company was for $2,000 and from the People's Insurance Company it was for $8,000. After the fire he had received $2,000 from the Asia Insurance Company in full and from the People's Insurance Company he had received only $5,000. He said that someone had come from the insurance companies to inspect the property after the fire. He had taken out a $2,000 cover from the Asia Insurance Company and $8,000 cover from the People's Insurance Company making a total of $10,000 and he did not want to buy a bigger insurance from these two companies. He said that he had earlier insured with the Asia Insurance Company for $10,000 but later reduced it to $2,000 and that was because he had taken out a cover for $8,000 from the People's Insurance Company. He said that he did not know why he had received only $5,000 from the People's Insurance Company on an $8,000 policy. With regard to the rubber sheets he said that the plaintiffs bought them from small holders and that their quantity varied from day to day. He had kept daily records of the rubber sheets and he had the record for the particular day when the fire broke out. About 500 pikuls of rubber were destroyed consisting of more than 100 pikuls of unsmoked rubber and the rest half-smoked. The unsmoked rubber sheets were worth $6,000 and the half-smoked worth about $18,000 to $19,000.

The second witness Lee Chiang Qui an insurance agent said in his evidence that in March 1971 he approached Khoo Swee Chong. He was then an insurance agent for Great Eastern Life Insurance Company and he also had a sub-agency from the defendant company. He had got this sub-agency from Associated General Corporation in Kuala Lumpur on a commission basis. He said that he valued the smoke house at $6,000 and the contents at $30,000 when he sold the policy to the plaintiffs. He had in his possession the defendants' proposal form and cover note for this purpose. Khoo Swee Chong wanted coverage for $20,000 for which he agreed as the value of the property was about $36,000. Subsequently the manager of Associated General Corporation accepted the proposal and agreed to give a cover note which was signed by the manager himself. Later he filled in the particulars in the cover note for which he had the authority and gave it to Khoo Swee Chong. He dated the cover note as April 2, 1971 although the cheque for $1,000.50 was dated and given to him on March 28, 1971. This was to allow time to clear

the cheque. He was subsequently informed that the proposal had been rejected by the defendants. He said that he did receive a letter dated April 8, 1971 from Khoo Swee Chong in Chinese saying that the smoke house was burnt whereupon he immediately informed the Associated General Corporation and asked for a claim form but they did not give him one. After that he did not see Khoo Swee Chong as his claim was already rejected by the defendants. He was now no more doing business with Associated General Corporation which ceased to exist after six months. He said that prior to the selling of the insurance to the plaintiffs he had sold some motor insurance for the defendants but he could not remember how many policies he had sold. On each occasion he had submitted the proposal form to Associated General Corporation for which he received commission. However as an agent he was not given any blank claim forms by the company.

In cross-examination Lee Chiang Qui said that the proposal form and the cover note were given to him by Associated General Corporation. He was appointed a sub-agent in March 1971. He agreed that it was the first policy he had sold after his appointment as a sub-agent for the defendants and he also agreed that it was his first fire insurance policy as he had not done any fire insurance business previously. He agreed that there were instructions by the company on fire insurance policies contained in a booklet issued by the Associated General Corporation. He was also instructed about fire insurance. He said that he checked the smoke house and the rubber but he was not very familiar with the business of rubber and smoke houses. He said that he valued the contents on that day at $30,000 to $36,000 but he was not aware that the quantity of rubber varied from day to day .He had seen the receipts in Chinese regarding the value of the rubber when he inspected the smoke house but he had not seen any entries in the books.

The defendants called one witness. He was Abdul Manaf bin Shariff their assistant claims manager. This witness said that Senibert Sendirian Berhad were the defendants' chief agents and he produced a copy of the appointment letter under which Senibert Sendirian Berhad were authorised to appoint sub-agents. Under the agreement there was no requirement for Senibert Sendirian Berhad to inform the defendants as to who the sub-agents were whom they had appointed and any sub-agent so appointed would be fully recognised by the defendants. The defendants had a special insurance policy in the case of fire insurance and he produced a specimen form. He had given blank proposal forms and blank cover notes to Senibert Sendirian Berhad who were also authorised to give the blank proposal forms and cover notes to their own sub-agents. He produced a specimen proposal form in which particulars of other insurances in respect of the same property had to be supplied. In order to ensure that the property was not over-insured he would also normally communicate with the other insurers to see how they had assessed the property. He said that after the fire the defendants did not receive any proper claim form. The claim form submitted by the plaintiffs was not the defendants' claim form.

In cross-examination the witness agreed that a cover note was issued pending a decision by the defendants whether to issue a policy or not and he further agreed that the cover note which was issued to the plaintiffs was the defendants' cover note. He said that the plaintiffs' proposal for a fire insurance policy was rejected because the defendants had already issued many insurances covering smoke houses. The defendants felt that there were too many policies covering this sort of risk but he was not able to say if that was the only reason for rejecting the proposal.

Raja Abdul Aziz Addruse for the defendants submitted that Lee Chiang Qui had no authority to act on behalf of the defendants because he was neither an agent nor a sub-agent of the defendants. In the agency agreement executed by the defendants and Senibert Sendirian Bernad the latter were authorised to appoint sub-agents throughout Malaysia and in accordance with the terms of that agreement Senibert Sendirian Berhad had appointed Associated General Corporation as sub-agents. The purported appointment of Lee Chiang Qui by the Associated General Corporation was improper — *delegatus non potest delegare* — and therefore the cover note issued by Lee Chiang Qui was not binding on the defendants. Secondly it was submitted that if the cover note was held to be valid and binding the plaintiffs had failed to comply with a condition in the form of fire insurance policy which provided for the defendants to be notified forthwith by the plaintiffs on the happening of any loss or damage and for the plaintiffs to make their claim in writing to the defendants within 15 days after the loss or damage or within such further time as the defendants may allow giving particulars of the loss and damage. Thirdly it was submitted that a fire insurance policy being a contract of indemnity the insurers had only to indemnify the plaintiffs for the actual loss and not the amount of $20,000 which was specified in the cover note. He submitted that the People's Insurance Company had sent an adjuster to assess the actual loss and had settled the claim in full for $5,000 although the insurance was taken out for $8,000. Therefore any amount exceeding the amount of $5,000 would tantamount to fraud on the defendants. The plaintiffs had given different values for the same properties when insuring with different insurers. Fourthly it was submitted that Khoo Swee Chong the managing partner of the plaintiffs had said in his evidence that he had with him the day to day records of the rubber stored in the smoke house but those records were not produced in court and therefore an adverse inference should be drawn against the plaintiffs by virtue of section 114(g) of the Evidence Act. Lastly it was submitted that the defendants were not liable under the policy by virtue of a condition therein that the defendants shall not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration. The loss or damage sustained by the plaintiffs occurred on April 2, 1971 and it was not until May 16, 1972 that the writ of summons were filed against the defendants.

Mr. Jagatheeson for the plaintiffs submitted that the cover note issued by Associated General Corporation on behalf of the defendants was a valid cover

note and that the insurance agent Lee Chiang Qui had the authority to issue the cover note. The plaintiffs had also complied with the condition that they should notify the defendants as soon as possible after the fire had broken out and subsequently a proper claim form was submitted to the defendants through Senibert Sendirian Berhad wherein the smoke house was valued at $10,000 and the contents at $25,000 at the time of the fire. Proper records had been kept by the plaintiffs. The plaintiffs' managing partner was questioned as to the records but he was not asked by counsel for the defendants to produce the records. As such no adverse inference could be presumed against the non-production of the records. As for the value of the property Mr. Jagatheeson submitted that this was a valued policy and the value of the property was held out to be $20,000 and that was the sum the plaintiffs were entitled to recover from the defendants. As far as the conditions were concerned the plaintiffs were not aware of the conditions because the actual policy had not been given to them and therefore they were not bound by any condition in the form of the fire insurance policy of the defendants.

At the end of the case and after listening to the submissions advanced on behalf of the parties I found in favour of the defendants and dismissed the plaintiffs' claim with costs. I agreed with Mr. Jagatheeson that the cover note which was issued by Lee Chiang Qui on April 2, 1971 was a valid cover note which bound the insured and the insurers in accordance with the terms stated therein. Senibert Sendirian Berhad were authorised to appoint sub-agents under the terms of their agency agreement with the defendants and pursuant to this authorisation they had appointed Associated General Corporation as their sub-agents. Associated General Corporation might not have been in a position to delegate their powers under the sub-agency to another person but I think that the appointment of Lee Chiang Qui as their insurance agent was not so much in conflict with the maxim *delegatus non potest delegare* as such but was rather an independent act by Associated General Corporation of employing some one to work for them. It is not unusual for chief agents or sub-agents of insurance companies to employ people who are loosely termed as insurance agents to sell insurance policies and pay commission on policies sold by them. These agents are however not normally authorised to sign cover notes or the actual policies. In the present case too the cover note was not signed by Lee Chiang Qui but by the manager of Associated General Corporation on behalf and for the defendants and therefore it was not really correct to say that Lee Chiang Qui had issued the cover note.

I also agreed that in the circumstances of this case no adverse inference should be drawn from the non-production of the records of the rubber sheets kept by the plaintiffs on the day when the fire broke out in the smoke house. Section 114(g) of the Evidence Act provides that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it but before any adverse inference may be drawn under illustration (g) of section 114 there must be some evidence of wilful or intentional withholding of the evidence concerned. Khoo Swee Chong the managing partner of the plaintiffs said in cross-examination that he had the records with him but the matter was not pursued any further by counsel for the defendants. He was not asked to produce the records nor was he asked to explain why he was not producing them. As such it could not be said that the witness was withholding evidence within the meaning of section 114(g) of the Evidence Act. At the most the oral evidence of the managing partner as to the value of the rubber might not be acceptable but no adverse inference could be drawn that if the records had been produced they would have shown that no rubber was lost in the fire (see the case of *Ramrati Kuer* v. *Dwarika Prasad Singh & Ors.*[1]).

As to the nature of the undertaking I agreed with Raja Abdul Aziz Addruse that the cover note being in respect of a fire insurance policy the contract between the parties was one of indemnity. Hence it was incumbent upon the plaintiffs first to prove that they had suffered a loss. Thereafter the amount which the plaintiffs would be entitled to recover would depend on the type of the policy. If it was a valued policy they would be entitled to recover the full sum of $20,000 which was stated in the cover note as the sum insured without having to prove the extent of their loss. On the other hand if it was an unvalued policy the amount which the plaintiffs could recover would be limited to the actual pecuniary loss suffered by them in which event the sum of $20,000 mentioned in the cover note would not represent the actual extent of the plaintiffs' pecuniary loss but depending on the terms and conditions of the policy might well be taken as the maximum sum which the plaintiffs might recover. It was necessary therefore to find out whether the policy in respect of which the cover note was issued by the defendants to the plaintiffs was a valued or an unvalued policy. In this connection some of the relevant provisions set out in the cover note and in the fire insurance policy of the defendants had to be considered. I think I should say it here at once that both the plaintiffs and the defendants were bound by the clauses and conditions in the defendants' printed form of policy which was admitted in evidence in this case. I shall give my reasons for saying so a little later when I come to discuss the cover note and its contents. The fact that the sum of $20,000 was stated as the sum insured in the cover note would not by itself establish the character of the policy as a valued policy. The cover note had to be read together with the defendants' fire insurance policy the very first clause of which provided that in the event of loss or damage by fire to the insured property the defendants would pay or make good to the plaintiffs the value of the property so destroyed or the amount of such damage thereto to an amount not exceeding the sum insured. It seemed to me that a fair and reasonable conclusion to be drawn from this clause was that the policy was an unvalued policy and that the sum of $20,000 stated in the cover note as the sum insured did not represent the extent of the actual loss that the plaintiffs might recover by way of indemnity but was the maximum sum recoverable in accordance with the terms of the aforesaid first clause in the defendants' fire insurance policy.

The plaintiffs were thus in a position where they were entitled if all else was in their favour to be indemnified for their loss but only up to a maximum sum of $20,000. It was for the plaintiffs to prove the extent of their loss but on the evidence before me I held that they had failed to adduce sufficient evidence to establish the extent of their loss which they had suffered in the fire.

First as to the value of the smoke house the evidence was insufficient, inconsistent and inconclusive. The managing director said in his evidence that at the date of the fire the approximate value of the smoke house was $10,000 and that was the sum which he had entered in the claim form as its value. However he also said in his evidence that the value of the smoke house which he had put in the proposal form was $5,000. This was some time in March 1971 and not long before the fire broke out on April 6, 1971. The evidence of Lee Chiang Qui supported neither of these two values for he said that when he sold the policy to the plaintiffs he had valued the smoke house at $6,000. Secondly with regard to the loss of the rubber the evidence of the managing partner was that the plaintiffs sustained a loss of $6,000 for the unsmoked rubber and $18,000 to $19,000 for the half-smoked rubber. He had kept daily records of the quantity of the rubber in the smoke house and he had the record for the particular day when the fire broke out but he did not produce the records. As I have said earlier no adverse inference could be drawn from the non-production of the records. Nevertheless, these records, if they had been produced would have been the best evidence to prove the quantity and the value of the rubber lost in the fire.

In this connection it was relevant to take into consideration the evidence that the People's Insurance Company which had insured the smoke house and the rubber for $8,000 had paid the plaintiffs only $5,000 after a full investigation. Stephen Lim who was mentioned in the plaintiffs' letter of April 12, 1972 was an adjuster from Syarikat Equitable Adjusters Sendirian Berhad as evidenced by the Syarikat's letter to the defendants dated August 30, 1972 which was one of the documents in the agreed and admitted bundle of documents in this case. The defendants were informed by this letter that the Syarikat was unable to extend to the defendants a copy of its survey report on the fire to the plaintiffs' property which occurred on April 6, 1971 without the prior approval of the Syarikat's principal the People's Insurance Company. It may therefore be reasonably inferred that in their survey report the adjusters would have valued the total loss which the plaintiffs suffered in the fire at no more than $5,000 which was the sum paid by the People's Insurance Company to the plaintiffs although the policy was for the sum of $8,000. Therefore in the light of the evidence that after a full investigation the People's Insurance Company paid $5,000 to the plaintiffs on an $8,000 insurance policy the bare word of the managing partner as to the value of the rubber at the time of the fire, without substantiating his evidence by producing the records which he had in his possession, carried little weight and I did not accept it. The plaintiffs thus failed to prove the extent of their loss or that it was more than the total sum of $7,000 which they had received from two insurance companies in respect of the smoke house and the rubber. Without proof of the extent of their loss the plaintiffs were not entitled to recover any sum from the defendants.

I shall now deal with the cover note. It was signed and issued on April 2, 1971 and was stated to remain in force for 30 days subject to the clauses and conditions of the defendants' printed form of policy. A specimen copy of this policy was admitted in evidence and the question in issue was whether the parties were bound by the terms and conditions set out in the policy. The answer to this question would appear to be that by incorporating the clauses and conditions of the defendants' fire insurance policy in the cover note and by the plaintiffs' acceptance of the cover note in that form and content both the plaintiffs and the defendants rendered themselves bound by those clauses and conditions. Authority for this proposition may be found in cases cited in the Third Edition of *Ivamy's General Principles of Insurance Law* at page 94 under the heading "The Incorporation of the Terms of the Policy". In the case of the *Queen Insurance Company* v. *William Parsons*[2] the appellants issued to the respondent a cover note termed as an interim receipt pending the issue of a proper fire insurance policy. The interim receipt stated that the respondent "had proposed to effect an insurance against fire, subject to all the usual terms and conditions of this company". The interim receipt also declared that the property insured would be held assured under those conditions during the currency of the interim receipt. The insured property caught fire before the policy had been delivered to the respondent and it was held by the Privy Council in effect that the words "subject to all the usual terms and conditions of this company" meant that the terms and conditions of the company's policy ought to be read into the interim receipt. In the case of *General Accident, Fire and Life, Assurance Corporation, Ltd.* v. *Shuttleworth & Anor.*[3] a cover note issued to the defendant in respect of a motor vehicle incorporated the terms and conditions of the plaintiffs' usual form of policy by stating in the cover note that the risk was "covered in terms of the Corporation's usual form of policy applicable thereto". Humphreys J. who heard this case gave effect to the terms and conditions of the plaintiffs' usual form of a motor vehicle policy by virtue of their express incorporation in the cover note.

Raja Abdul Aziz Addruse had referred to two conditions in the policy which he submitted had not been complied with by the plaintiffs. It was said that the plaintiffs had failed to comply with the condition that the plaintiffs should forthwith notify the defendants on the happening of any loss or damage to the insured property and to make their claim in writing within 15 days after such loss or damage. Secondly it was said that the plaintiffs were out of time in bringing their action against the defendants by virtue of the condition that the plaintiffs would not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration. As to the first of these conditions there

was in my view sufficient compliance. The plaintiffs' first notification dated April 8, 1971 addressed to Lee Chiang Qui was not enough as it was not a notification to the defendants as provided for in the policy but the plaintiffs' written claim dated April 10, 1971 addressed to the defendants and setting out particulars of the fire and the loss or damage incurred by the plaintiffs complied with this particular condition. The plaintiffs' claim was evidently not made out in the defendants' fire claim form but this was not obligatory for nowhere was it provided in the policy that in making such a claim the defendants' form only should be used. What proved fatal to the plaintiffs' claim was the operation of the other condition referred to by Raja Abdul Aziz Addruse which was that "In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration". The fire to the insured property and in consequence the loss or damage suffered by the plaintiffs occurred on April 6, 1971. There was no pending action or arbitration within twelve months of the happening of the loss or damage so that when the plaintiffs filed their action against the defendants by writ of summons dated May 16, 1972 the defendants had ceased to be liable to the plaintiffs for any loss or damage.

In the circumstances therefore I held that the plaintiffs had failed to prove their case and I accordingly dismissed their claim against the defendants with costs.

Claim dismissed.

Solicitors: *John Ang & Co.; Rithauddeen & Aziz.*

LEE WENG SANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim Yeop A. Sani J.) January 14, 1977]
[Ipoh — Criminal Appeal No. 14 of 1976]

Criminal Law and Procedure — Re-trial — Trial de novo — Criminal Procedure Code (F.M.S. Cap. 6), s. 316(a).

Public Prosecutor — Charge — Right to amend, reduce, alter or enhance — Criminal Procedure Code (F.M.S. Cap. 6), s. 376(i).

An order of retrial would result in the trial to commence *de novo* and even if the appellate judge had thought it fit to frame the charge or charges appropriate in his view for retrial that would not deprive the Public Prosecutor from exercising his own power under the Criminal Procedure Code to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings.

Lee Teck Hock v. *Public Prosecutor*[2] dissented from.

Cases referred to:-

(1) *Lee Weng Sang* v. *Public Prosecutor* [1976] 1 M.L.J. 82.

(2) *Lee Teck Hock* v. *Public Prosecutor* [1973] 2 M.L.J. 130.

(3) *Nazimuddin* v. *Emperor* I.L.R. 40 Cal. 163.

(4) *Long bin Samat* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(5) *Nawi bin Buyong* v. *Public Prosecutor* [1936] M.L.J. 71.

(6) *Cheah Yew Fatt & Anor.* v. *Public Prosecutor* [1960] M.L.J. xlvi.

MAGISTRATES CRIMINAL APPEAL.

Paramjit Singh for the appellant.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J.: The background of this appeal is very simple. The appellant in this appeal was the same appellant in an earlier proceeding in *Lee Weng Sang* v. *Public Prosecutor*[1] when this same court ordered his convictions for offences under the Firearms (Increased Penalties) Act, 1971 and the Arms Act, 1960 (for unlawful possession of a pistol and a grenade and unlawful possession of 54 rounds of ammunitions) be quashed and that there should be a retrial. When he was produced again before the Special President following the order of retrial the prosecution applied to the court below to have the charges amended to ones under section 57(i)(a) of the Internal Security Act, 1960 carrying the death penalty. His counsel objected to the amendment of the charges but his objection was overruled. Accordingly under the Essential (Security Cases) Regulations, 1975 the appellant was committed for trial in the High Court. The appellant now appeals against the order of the learned President in allowing the amendment to the charges.

The contention of the counsel for the appellant is also simple. It is contended that by allowing the amendment to the charges before the plea was taken on the original charges the learned President had deviated from the order of retrial made by the appellate court. In other words, the amendment of the charges clearly contravened the order of retrial and this according to him vitiated the proceedings. Counsel cited *Lee Teck Hock* v. *Public Prosecutor*[2] where B.T.H. Lee J. also dealt with section 267(c) of the Sarawak Criminal Procedure Code. In that case the order of the appellate judge in the first appeal was as follows: —

"The conviction is quashed and the sentence set aside. I order a new trial before another magistrate."

The conviction concerned in that case was on a charge of driving a motor car without due care and attention. After the order of retrial the appellant was charged with two charges — the original charge and an alternative charge of driving without reasonable consideration for other persons using the road. At the retrial he was convicted of driving without due care and attention and the alternative charge was struck out at the conclusion of the defence case. It was held by the learned judge on appeal that the appellate judge in the earlier proceeding had merely ordered a new trial and it was wrong to allow the addition of an alternative charge at the commencement of the retrial.

It must first be borne in mind that in considering *Lee Teck Hock's case, supra,* the learned judge was dealing with section 267(c) of the Sarawak Criminal Procedure Code which provides that in an appeal the appellate judge may direct that further inquiry be made *or* order a new trial *on the same or an amended charge.* These last seven words are not found in the